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Supreme Court, U.S.
FILED

No. 001068 DEC 26 2000

OFFICE OF THE CLERK

In the Supreme Court of the United States

BAYOU FLEET, INC.
Petitioner

VERSUS

HOME PLACE BATTURE LEASING, INC., NEAL CLULEE, MARY CLULEE and N/C MATERIALS, INC.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
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No. 99-31172

BAYOU FLEET, INC.,
Plaintiff-Appellant,

VERSUS

ELLIS A. ALEXANDER, ET AL,
Defendants

HOME PLACE BATTURE LEASING, INC.;
NEAL CLULEE; MARY CLULEE;
N/C MATERIALS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before KING, Chief Judge, PARKER, Circuit Judge, and FURGESON, District Judge.

ROBERT M. PARKER, Circuit Judge:

*District Judge of the Western District of Texas sitting by designation.

Appellant Bayou Fleet, Inc. appeals from the district court's order granting Mary and Neal Clulee's motion to amend the partial final consent judgment and the district court's final judgment dismissing Bayou Fleet's claims with prejudice. Bayou Fleet filed this action against Ellis Alexander; St. Charles Parish; the Parish's insurer, Coregis Insurance Company; Neal Clulee and his wife Mary Clulee ("the Clulees"); and the Clulees' two companies, Home Place Batture Leasing, Inc. ("Home Place") and NIC Materials, Inc. Bayou Fleet alleged that the defendants conspired to eliminate it from the sand pit business through challenges to its zoning status and through attempts to persuade authorities against issuing permits. Specifically, Bayou Fleet alleged that the defendants abused its constitutional rights through a civil conspiracy under 42 U.S.C. § 1983 and violated the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Louisiana Unfair Trade Practices Act, LA. REV. STAT. ANN. § 51:1401, et seq., through their efforts to put its sand pit operation out of business.

Before trial, Bayou Fleet settled with Alexander, St. Charles Parish, and Coregis Insurance Company. In lieu of the settlement, the court entered a consent judgment, but later amended portions of the judgment that pertained to Bayou Fleet's zoning status. At the close of a non-jury trial, the district judge denied Bayou Fleet relief against the Clulees, holding that the Clulees were immune from liability under the *Noerr-Pennington doctrine. See Bayou Fleet, Inc. v. Alexander,* 68 F. Supp. 2d. 734, 744 (E.D. La. 1999) . Bayou Fleet argues on appeal that the trial court effectively denied its First Amendment right of access to the courts, abused its discretion by amending the consent judgment, and

erred in its dismissal of the case under the *Noerr-Pennington doctrine.*

I.

This case involves one of several disputes in a long feud between the Durant family and the Clulee family in Hahnville, Louisiana.[1] Both families own businesses alongside the Mississippi River in St. Charles Parish. The conflict in this case concerns the Clulees' attempts to curtail the Durants' sand pit operations. The Durants own plaintiff-appellant Bayou Fleet, and the Clulees own defendants-appellees Home Place and NIC Materials. Bayou Fleet and Home Place maintained the only active sand pits in Hahnville.[2]

In 1997, Ronald Adams Contractors, Inc. ("Adams") needed sand from the Mississippi River to construct roads in a nearby parish. Adams required a permit from the U.S. Army Corps of Engineers to dredge sand from the Mississippi and a permit from the LaFourche Basin Levee District Board of Commissioners ("the Levee Board") to operate a sand pit, in which the sand would be stored until trucks hauled it to the construction sites. After receiving bids from local sand pit operators, Adams chose Bayou Fleet.

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[1] For a history of the controversy between the parties in this case, *see Bayou Fleet*, 68 F. Supp. 2d. at 736-743.

[2] A third sand pit, owned by the Giambelluca family, went out of business after a dispute between the Giambellucas and the Clulees. *See Giambelluca v. Parish*, 687 So.2d 424 (La. Ct. App. 5th Cir. 1996).

Adams filed for the necessary permits in March of 1997. Shortly thereafter, the Corps of Engineers received a number of complaints from residents near Bayou Fleet's property who opposed the operation of sand pits in the area. The neighbors complained that sand pit operations create health risks from air pollution, safety problems around the pits, and general nuisances from trucks traveling to and from the pits.

Robin Durant and a representative from Adams met with Ellis Alexander, a Parish Councilmember renowned for his oppositions to sand pits. Durant and Adams assured Alexander that all precautions would be taken to reduce the hazards caused by the sand pit operations. Alexander did not openly oppose Bayou Fleet's operations at their meeting.

In order to solicit business for his own sand pit, Neal Clulee set up a meeting with Adams to discuss the sale of sand from Homplace. At the meeting, Clulee informed Adams that he opposed the Bayou Fleet operation and that, unlike Bayou Fleet, "he could keep the local authorities satisfied." *Bayou Fleet,* 68 F. Supp. 2d at 738. Adams declined Mr. Clulee's offer.

Bayou Fleet claims that the alleged conspiracy between Alexander and the Clulees began on April 28, 1997. On this date, telephone records show that Neal Clulee made several attempts to contact Alexander. Shortly after the calls, Alexander informed Earl Matherne, Director of the Department of Planning and Zoning for St. Charles Parish, that Alexander's constituents were objecting to Bayou Fleet's

sand pit operations under the Parish's zoning ordinance.[3] Matherne submitted the zoning issue to the Parish Attorney, who, after reviewing Bayou Fleet's business records, concluded that Bayou Fleet had not lost its non-conforming use status.

Bayou Fleet claims that the conspiracy continued from May through December of 1997, in which time Alexander argued before the Parish Council, the St. Charles Parish Coastal Zone Advisory Committee ("the Zoning Committee"), and the Levee Board against Bayou Fleet's sand pit operations. Neal Clulee made over forty phone calls to Alexander's home during this time. The telephone company's records show that many of these calls corresponded to Alexander's protests before local authorities.[4]

On May 29, 1997, at a regular Zoning Committee meeting, Alexander and the Clulee's lawyer, Joel T. Chaison, urged the committee to recommend that the Parish Council submit a letter of objection to the Corps of Engineers

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[3] The zoning ordinance restricted the operation of sand pits, but allowed preexisting sand pits to continue in use as long as operations did not cease for six months. Therefore, Bayou Fleet could continue its non-conforming use so long as it had not let its sand pit business cease operations for six months.

4 The Clulees also attempted to sway public officials without Alexander's help. On May 30, 1997 and July 3, 1997, Mary Clulee wrote to the Corps of Engineers protesting Adams' proposed dredging permit. Mrs. Clulee claimed that Adams intended to dredge sand from a section of the river located immediately in front of the Clulees' property. Despite Adams' assurance in June of 1997 that it would not dredge in front of the Clulee property, the Clulees maintained their opposition to the project.

concerning Adams' permit. Seven members of the public also spoke in opposition to Adams' project at the meeting. That same day, Clulee placed two telephone calls to the Alexander residence. Despite Alexander's protests, the Zoning Committee issued a recommendation to the Parish Council that supported Adams' project.

On June 2, 1997, at a regularly scheduled meeting of the Parish Council, Alexander proposed a resolution to issue a letter of objection to the Corps of Engineers urging the denial of Adams' permit application. Alexander suggested that, in the alternative, Adams should be required to take extra precautions to eliminate safety and health hazards by using Home Place's access ramp instead of Bayou Fleet's ramp, because the latter was located too close to residential neighborhoods. Because there was no road to the Clulees, ramp from Bayou Fleet's property behind the levee, the alternative proposal had the same effect as the letter of objection. Nonetheless, the Parish Council adopted Alexander's resolution. Prior to the Levee Board meeting, Neal Clulee made four calls to Alexander's home.

Alexander forwarded the Parish Council's objection to the Levee Board, which, in turn, denied Adams' permit. Without the Levee Board's permission to stockpile and move the sand over the levee, the Corps of Engineers could not issue a permit to dredge the sand out of the river. However, Adams was able to postpone a final decision from the Corps of Engineers until a second meeting of the Levee Board.

On July 1, 1997, the Levee Board reconsidered its previous decision and granted Adams' operation permit.

Alexander, Adams, and Durant attended the meeting. Although the Clulees were not present, Neal Clulee placed two calls to Alexander's residence before the meeting.

At the following Parish Council session, Alexander proposed a resolution to audit Bayou Fleet's sales tax returns. Although the Parish Council denied Alexander's proposition, Alexander was able to convince the St. Charles Parish Tax Collection Department to conduct a sales tax audit of Bayou Fleet, which resulted in no tax violations. During this period, the Clulees placed two more telephone calls to Alexander.

On July 14, 1997, Bayou Fleet filed the present lawsuit against Alexander, the Parish, the Clulees and the Clulees' companies, Home Place and NIC Materials.

Despite the fervent opposition by Alexander to Adams' operation, the Corps of Engineers issued Adams a permit to dredge on July 21, 1997.

Nonetheless, Alexander continued his assault against Bayou Fleet's sand pit operation. At the Parish Council meeting on September 8, 1997, he proposed a new Levee Law ordinance and a Special Legal Counsel resolution The Council adopted the proposals over the veto of the Parish President. The Levee Law required the permission of the Parish Council before anyone was allowed to cross over the levee. Violation of the ordinance was a criminal offense. The Special Legal Counsel resolution mandated the appointment of legal counsel to conduct an investigation into Bayou Fleet's zoning status. Alexander requested that Joel T.

Chaisson, the Clulees' attorney, be appointed to the the position.

Bayou Fleet filed for an injunction and for declaratory relief in federal district court. The district court held that the Levee Law and the Special Legal Counsel resolution was submitted in retaliation to Bayou Fleet's law suit and "with a bad faith intent to injure Bayou Fleet." *Bayou Fleet Inc. v. Alexander*, 1997 WL 625492, *8 (E.D. La. Oct. 7, 1997). The court concluded that the ordinance and resolution violated the equal protection clause of the Fourteenth Amendment.

On March 12, 1998, Alexander filed a motion for summary judgment. The district court granted the motion and dismissed Bayou Fleet's claims against Alexander in his individual capacity under the *Noerr-Pennington* doctrine. The court held that Alexander was personally immune from liability for his appearances before the Zoning Committee and the Levee Board. *See Bayou Fleet, Inc. v. Alexander*, 26 F. Supp. 2d 894, 897 (E.D. La. 1998).

The district court's ruling on the Parish Council ordinances and the court's dismissal of the suit against Alexander prompted settlement negotiations between the remaining parties. The defendants, with the exception of the Clulees, reached a settlement on December 9, 1998. The settlement required the Parish Council to recognize Bayou Fleet's nonconforming use status. The district judge signed the consent judgment on January 21, 1999.

Before the parties reached their settlement agree-

ment, the Clulees filed a mandamus action in state court to challenge Bayou Fleet's operations under the zoning restrictions. In response to the federal court's consent judgment, the Clulees filed a motion to amend or alter the judgment, claiming that the federal judge's consent decree affected their rights in state court. The district judge granted the Clulees' motion. Bayou Fleet argues on appeal that the court abused its discretion by amending the consent judgment.

On February 12, 1999, ten days before trial, the district judge ordered Bayou Fleet and the Clulees to submit briefs on whether the Clulees were entitled to *Noerr-Pennington* immunity. Bayou Fleet argued that because the Clulees did not timely raise *Noerr-Pennington* as an affirmative defense, the issue was waived. The Clulees moved for summary judgment, but the court declined to rule on the motion until the conclusion of trial. Bayou Fleet and the Clulees proceeded to trial before the district judge on February 22, 1999. The trial court entered its judgment dismissing Bayou Fleet's case for reasons of *Noerr-Pennington* immunity on September 29, 1999.

II.

A. Right of Access to Courts

In its first point of error, Bayou Fleet claims that it was denied its First Amendment right of access to the courts because of a law clerk's improper participation in the non-jury trial. Bayou Fleet claims that the law clerk directed the district judge during the course of proceedings to the extent that the law clerk effectively presided over the trial. It argues

that the law clerk's participation denied it meaningful access to the courts.[5]

Bayou Fleet points to several instances in the trial record that it claims are representative of the law clerk's leading role in the proceedings. First, the law clerk interrupted the judge regarding the time when the judge could rule on a motion. After the judge answered an attorney's question regarding the time when he would rule on a motion, the law clerk interjected stating, "Judge, there is no way we can rule on it by 1:30 today because I am sitting in the courtroom right now." To which the judge replied to counsel, "It will have to be later."

Second, Bayou Fleet complains that the law clerk questioned witnesses and corrected the judge's ruling on the defendants' motion for summary judgment. The judge stated that the motion for summary judgment was denied, and the law clerk interrupted stating, "Judge, it's not the merits that

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[5] Bayou Fleet cites several cases from this Court where either counsel or the judge should have been disqualified because of a law clerk's special knowledge of a case. See Hall v. Small Business Administration, 695 F. 2d 175 (5th Cir. 1983) (holding that a law clerk's continuing participation with a judge in a case in which her future employer was counsel gave rise to an appearance of impartiality) ; Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251 (5th Cir. 1978) (concluding that counsel had an unfair advantage because he worked as the judge's law clerk in an earlier trial of the case) ; Kennedy v. Great Atlantic & Pacific Tea Co., Inc., 551 F.2d 593 (5th Cir. 1977) (holding that a law clerk could not gain special knowledge of a case through his own investigation of the facts). The law clerk in this case did not have special knowledge of the facts that would raise an appearance of impartiality. These cases do not address the issue of whether a law clerk's participation at trial precludes a litigant's right of access to the courts.

are denied, it's denied because they set it af ter trial. The merits of the motion will be addressed in the opinion." Bayou Fleet argues that this exchange clearly indicates that the law clerk was ruling on the motion instead of the judge.

Finally, Bayou Fleet points out that the judge interrupted court for two days so the law clerk could travel out of town to visit her mother. Bayou Fleet alleges that the court's decision to postpone the trial suggests that the judge was incapable of presiding over the trial without the law clerk present.

The Clulees insist that Bayou Fleet has taken the law clerk's behavior out of context. The Clulees assert that the judge intervened and ruled on objections throughout the trial without the clerk's assistance. They claim that, in any event, after two years of pretrial proceedings that culminated in several published and unpublished opinions, Bayou Fleet cannot convincingly argue that it was denied access to the courts.

Access to the courts is a constitutionally protected fundamental right and one of the privileges and immunities awarded citizens under Article IV and the Fourteenth Amendment. *See Chambers v. Baltimore & Ohio Railroad,* 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907). The First Amendment right to petition the government has as one aspect the right of access to the courts. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ; *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979) ; *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Coastal States*

Marketing, Inc. v Hunt, 694 F.2d 1358, 1363 (5th Cir. 1983) Judge Thornberry's writing in *Ryland v. Shapiro,* 708 F.2d 967 (1983), serves to guide our analysis today. Relying on *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) and *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979), we learn in *Ryland* that

> A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful."

We therefore have reviewed this record to determine whether the unusual and troubling participation in this non-jury trial by the judge's law clerk served to deny *Bayou Fleet* meaningful access to the courts. Our review is further guided by the recognition that Article III of the constitution vesting power in the Federal Courts can only be read to vest the power of the court in its officeholder - the judge. Indeed the judge is the only person involved in the trial of cases in Federal Court who has taken an oath pursuant to Article III. It follows that the constitution requires those functions traditionally comprising the act of judging be performed by the judge.

Our review of the record persuades us that *Bayou Fleet* was not denied meaningful access to the courts. The judge was engaged in the pretrial stage and the trial itself. He questioned both witnesses and lawyers during the trial, ruled on the evidence and made those decision that were necessary for a traditional trial. We therefore, can not say that in this case that staff usurped the judge's role in the decision-making process of the trial. The involvement of the

judge's law clerk in the trial was unfortunate and the judge should take whatever action is necessary to make sure that it does not recur.

B. The Consent Judgment

Before Bayou Fleet, the Parish, Alexander and Coregis Insurance Company reached their settlement agreement, the Clulees filed suit in state court to determine whether Bayou Fleet properly retained its zoning status. After the district judge signed the consent judgment, Bayou Fleet introduced the judgment in state court claiming that the proceeding was barred by the doctrine of res judicata. The Clulees filed a motion in federal district court to amend or alter the consent judgment. The district court granted the Clulees' motion. Bayou Fleet alleges that the court abused its discretion by amending the judgment.

A consent judgment, also known as a consent decree, is freely negotiated by the parties and has the full effect of res judicata. *See United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) (en banc) (Rubin, J.) . Because a consent judgment has a continuing affect on the rights of litigants, courts are required to ascertain whether the parties agreement "represents a reasonable factual and legal determination based on the facts of the record . . .. " *Id.* at 441. "A consent decree must arise from the pleaded case and further the objectives of the law upon which the complaint is based." *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (citing *Local No. 93, Intfl Ass'n of Firefighter v. City of Cleveland*, 478 U.S. 501, 525 (1986)) . When litigants reach a settlement that also affects

third parties, "the court must be satisfied that the affect on them is neither unreasonable nor proscribed." *City of Miami*, 664 F.2d at 441. We review the approval. or denial of a consent judgment for abuse of discretion. *See Williams v. City of New Orleans*, 729 F.2d 1554, 1558 (5th Cir. 1984).

Bayou Fleet argues that the zoning issue was resolved in the court's October 1997 order, in which the judge held that the Parish Council's Levee Law and Special Legal Counsel resolution was unconstitutional. Bayou Fleet also claims that the Clulees should not be able to attack the consent judgment simply because they refused to approve the final settlement.

A consent judgment must be founded on the legal and factual issues raised in the pleadings. *League of United Latin Amer. Citizens,* 999 F.2d at 846. Bayou Fleet petitioned the district court for relief under section 1983 and antitrust laws and for an injunction and declaratory relief regarding the Parish Council ordinances. The parties did not ask the court to resolve the zoning issue in their pleadings, and the court's October 1997 order did not determine whether Bayou Fleet retained its zoning status.[6]

Courts must also examine the effect of a consent judgment on third parties. *See Local No. 93, Intfl Assfn of*

[6] The district court's order states, "The evidence supports the Parish Council's conclusion that Bayou Fleet did not lose its non-conforming status." *See Bayou Fleet v. Alexander*, 1997 WL 625492, *8 (E.D. La. 1997). Put into context, the court's assertion indicates that the defendants did not provide adequate reasons why special legal counsel should be appointed since the Parish Council had previously investigated Bayou Fleet's zoning status. See *id*. The court did not reach a legal conclusion concerning the zoning ordinances applicability to Bayou Fleet.

Firefighter, 478 U.S. at 529. Louisiana law allows any person to file a civil action to enforce compliance with zoning restrictions. See LA. REV. STAT. ANN. § 9:5625 (1997) . Even though the Clulees participated in the negotiation process, they did not agree to the settlement terms. Instead, they filed suit in state court to determine the zoning dispute. Just because the Clulees participated in settlement negotiations and refused to acquiesce to the settlement terms does not alleviate the district court's duty to assess the judgment's affect on their rights. By signing the consent judgment, the district judge frustrated the Clulees' right to file an action in state court to enforce the zoning restrictions. Because the consent judgment adversely affected the rights of non-settling third parties, the district court did not abuse its discretion by amending the consent judgment.

C. *Noerr-Pennington* Immunity

The *Noerr -Pennington* doctrine confers immunity to private individuals seeking anticompetitive action from the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) . *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (extending *Noerr-Pennington* protection to petitioning activities aimed at state and federal agencies and courts) ; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (granting *Noerr-Pennington* immunity for efforts to influence local governments) . *Noerr-Pennington* immunity applies to any concerted effort to sway public officials regardless of the private citizen's intent. *See Pennington*, 381 U.S. at 670. Although

the Supreme Court has limited its discussion of *Noerr-Pennington* immunity to cases involving antitrust litigation, this Court has extended the *Noerr-Pennington* doctrine to include claims under section 1983. *See Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) .[7]

The district court held that the *Noerr-Pennington* doctrine was not an affirmative defense and that the issue of immunity could be raised at any time. The court further concluded that the Cluelees were immune under *Noerr-Pennington* for contacting Alexander concerning Alexander's attempts to thwart Bayou Fleet's sand pit operations. The district court therefore dismissed Bayou Fleet's

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[7] *Noerr -Pennington* immunity does not stem solely from the First Amendment; rather, it is inextricably associated with interpretations of - the Sherman Act. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) . The Tenth Circuit has pointed out that the *Noerr-Pennington* doctrine should not describe immunity that arises only from the First Amendment right to petition. *See Cardtoons, L.C. v. Major League Baseball Players Assfn*, 208 F.3d 885, 888-91 (10th Cir. 2000) ("While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the *NoerrPenningtondoctrine* . . . . ") . However, where an individual's conduct raises *Noerr-Pennington* immunity under antitrust law, the same conduct "is also out of the scope of section 1983 liability." Video Int-11 Prod.., Xnc., 858 F.2d at 1084. The Clulees may be entitled to immunity both under the Noerr-Pennington doctrine for purposes of antitrust liability and the First Amendment for purposes of Bayou Fleet's section 1983 claim. Because the same facts and legal analysis apply to both theories of immunity, we will not make a distinction between the two.

section 1983, Sherman Act, and Louisiana Unfair Trade Practices Act claims. *See Bayou Fleet v. Alexander,* 68 F. Supp. 2d 734 (E.D. La. 1999) .

Bayou Fleet argues on appeal that *Noerr -Pennington* immunity is an affirmative defense, which was waived because the Cluelees failed to timely assert it under Rule 8 (c) of the Federal Rules of Civil Procedure. Bayou Fleet also contends that, in the alternative, the *Noerr-Pennington* doctrine does not apply to the behavior exhibited by the Clulees.

1. Waiver of the *Noerr-Pennington* Affirmative Defense

As we recently held in *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000), the *Noerr-Pennington* doctrine should be raised as an affirmative defense.[8] Generally, a party's failure to raise an affirmative defense in its first responsive pleading results in waiver. *Lucas v. United States,* 807 F.2d 414, 417 (5th Cir. 1986). "However, where 'the matter is raised by the trial court [or the litigants] that does not result in unfair surprise, technical failure to comply precisely with Rule 8(c) is not fatal,' and in such a situation a court may hold that the defense is not waived." *McConathy v. Dr. PepperlSeven Up Corp.*, 131 F. 3d 558, 562 (1998) (quoting Lucas, 807 F. 2d at 417) . An

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[8] In *Acoustic Systems*, we stated that the *Noerr-Pennington* doctrine does not provide persons complete immunity from suit; rather, the "doctrine provides only an affirmative defense...." *Acoustic Systems, Inc.*, 207 F.3d at 296. The trial court erred in holding that *Noerr-Pennington* immunity should not be raised as an affirmative defenses.

affirmative defense is not waived if it is raised at a "pragmatically sufficient time, and the plaintiff was not prejudiced in its ability to respond." *Chambers v. Johnson*, 197 F.3d 732, 735 (5th Cir. 1999) (quoting Lucas, 807 F.2d at 418) We therefore look to the record to ascertain whether the trial court raised *Noerr-Pennington* at a pragmatically sufficient time and whether Bayou Fleet was prejudiced by the delay in raising the defense. *See id.*

Noerr-Pennington was first raised by Ellis Alexander in his motion for summary judgment filed on January 2, 1998. Alexander claimed that he was entitled to immunity for his personal efforts to persuade the Levee Board, the Zoning Committee, the Army Corps of Engineers and the Parish Council to curtail Bayou Fleet's sand pit operations. Bayou Fleet submitted a memorandum on the *Noerr-Pennington* issue in response to Alexander's motion. The district court dismissed Bayou Fleet's suit against Alexander in its September 1998 order. *See Bayou Fleet v. Alexander*, 26 F. Supp. 2d 894 (E.D. La. 1998) . Hence, Bayou Fleet was aware that *Noerr-Pennington* was an issue in the case at least by January 2, 1998.

After its order dismissing Alexander in his personal capacity, the Clulees raised the issue for the second time in the Pre-Trial Order dated February 4, 1999, approximately eighteen days before trial. Although Bayou Fleet objected to immunity as a contested issue of law, it does not appear that the court ever ruled on the objection. On February 11, 1999, the district judge requested each party to submit a brief on the applicability of *Noerr-Pennington*. The Clulees then filed a motion for summary judgment on the basis of *Noerr-*

Pennington immunity. Bayou Fleet also submitted its memorandum claiming either that *Noerr-Pennington* had been waived or that it did not apply.

The non-jury trial began on February 22 and continued through March 1. During trial, the Clulees sought to amend their original answer to include the *Noerr-Pennington* issue, but the trial court denied their motion. The court specifically stated that its ruling was not a finding that the issue had been waived.

Bayou Fleet relies on *Haskell v. Washington Township,* 864 F.2d 1266, 1273 (6th Cir. 1988), in which the Sixth Circuit found that the trial court could not raise *sua sponte* a statute of limitations defense after three years of litigation. Unlike the litigant in *Haskell*, Bayou Fleet knew that *Noerr-Pennington* was an issue in the case when Alexander filed his motion for summary judgment almost one year before trial. Bayou Fleet's argument that it was unfairly surprised by the Clulees' attempts to raise immunity in the Pretrial Order is untenable.

Bayou Fleet argues that its inability to conduct discovery concerning the "sham" exception to the *Noerr-Pennington* doctrine resulted in prejudice. At no time after the issue was raised in the Pretrial Order did Bayou Fleet move for a continuance to conduct discovery concerning the "sham" exception. Instead, Bayou Fleet argued in its pretrial memorandum that it was prejudiced by the timing of the immunity issue, but it did not state how. On appeal, Bayou Fleet claims for the first time that they were not given the opportunity to conduct adequate discovery. Given the fact

that Bayou Fleet knew *Noerr-Pennington* was a potential issue throughout most of the discovery process, we find no evidence that Bayou Fleet was prejudiced. Thus, the trial court did not err by addressing the *Noerr-Pennington* issue.

2. Applicability of the *Noerr-Pennington* Doctrine to the Cluelees

Bayou Fleet argues, in the alternative, that the *Noerr-Pennington* doctrine does not apply to the Clulees' lobbying efforts. Bayou Fleet points to the courts October 1997 order in which the district court concluded that Alexander's proposals were proffered in retaliation to Bayou Fleet's law suit. Bayou Fleet contends that *Noerr-Pennington* does not apply to retaliatory behavior or conduct in furtherance of a conspiracy. Specifically, Bayou Fleet claims that the *Noerr-Pennington* doctrine should not protect defendants who retaliate against plaintiffs for exercising their First Amendment right to petition the courts.

The Supreme Court has clearly stated that efforts to influence public officials will not subject individuals to liability, even when the sole purpose of the activity is to drive competitors out of business. *See Pennington*, 381 U.S. at 670. The Court has allowed only one exception to the *Noerr-Pennington* doctrine--the "sham" exception. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 380.[9]

[9] Bayou Fleet urges this Court to ignore the *Noerr-Pennington* doctrine because the defendants were allegedly involved in a civil rights conspiracy. A conspiracy exception to *Noerr-Pennington* immunity has been explicitly rejected by the Supreme Court unless the conspiracy "reaches beyond mere anticompetitive motivation." *Omni Outdoor Advertising, Inc.*, 499 U.S. at 383. Bayou Fleet did not allege that the Clulees motives included anything other than their desire to put its sand pit out of business.

The "sham" exception involves attempts to influence public officials for the sole purpose of expense or delay. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 380. The exception applies to defendants who use the process as an anti-competitive weapon, rather than those who genuinely seek to achieve an intended result. See *id.* at 381. The evidence must show that a defendant's lobbying activities were "objectively baseless" for the "sham" exception to apply. *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ; *Brown & Root, Inc. v. Louisiana State AFL-CIO,* 10 F.3d 316, 324 (5th Cir. 1994). Lobbying activity is objectively baseless if a reasonable private citizen could not expect to secure favorable government action. *See Professional Real Estate Investors,* 508 U.S. at 60 ("[T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits").

Bayou Fleet argues that the Clulees lobbied local officials in retaliation to Adams' contract with Bayou Fleet and, later, Bayou Fleet's lawsuit. Bayou Fleet does not assert that the Clulees' endeavors were objectively unreasonable. To the contrary, the evidence shows that a reasonable private citizen could expect to secure favorable government action. See *id.* The Clulees contacted a Parish Council-member and wrote letters to the Army Corps of Engineers in hope to deny Adams permits and revoke Bayou Fleet's non-conforming zoning status. Their efforts resulted in the Parish Council's adoption of a letter of objection to Adams' dredging permit, a review of Bayou Fleet's zoning status, and the approval of the Levee Law and Special Legal Counsel resolution. Because the Clulees achieved favorable results, their

endeavors were, by definition, reasonable. See *id.* at 61 n.5. The "sham" exception therefore does not exclude the Clulees from *Noerr-Pennington* protection.

Bayou Fleet asks this Court to create a new exception to the *Noerr-Pennington* doctrine based on a defendant's retaliatory conduct. Bayou Fleet claims that the Clulees' should not be protected under *Noerr-Pennington* because their lobbying activities affected its First Amendment right to petition the courts for relief. Bayou Fleet claims that *Noerr-Pennington* cannot be used to illegally abridge the rights of other citizens. The Supreme Court has not established a separate exception to the *Noerr-Pennington* doctrine for retaliatory intent, and we decline to create a new exception here.

In *California Motor Transport*, the Supreme Court held that First Amendment rights may not be used to deter competitors "from having 'free and unlimited access' to the agencies and courts." 404 U.S. at 515. The Court concluded that attempts to deter competitors from petitioning the courts and government agencies were not protected under *Noerr-Pennington*. *See id.* However, the Court's holding in *California Motor Transport* is limited to the confines of the "sham" exception. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 1355. As a result, *Noerr-Pennington* applies to all genuine lobbying efforts, despite subjective intent and the net effects on a competitor's First Amendment rights. *See Professional Real Estate Investors,* 508 U.S. at 57. Thus, retaliatory lobbying efforts are not per se excluded from *Noerr-Pennington* protection unless the "sham" exception applies.

Bayou Fleet does not argue and the record does not show that the Clulees lobbying efforts were objectively unreasonable. We therefore conclude that the district court's dismissal of Bayou Fleet's section 1983, Sherman Act, and Louisiana Unfair Trade Practices Act claims was not error. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 384 (applying *Noerr-Pennington* to dismiss an antitrust claim under state law) ; *Video Int'l Prod., Inc.*, 858 F. 2d at 1084 (applying *Noerr-Pennington* to shelter individuals from liability under section 1983).

III.

In sum, we conclude that the law clerk's role in the non-jury trial did not affect Bayou Fleet's right of meaningful access to the courts. We also affirm the district court's order granting the amendments to the consent judgment and the court's dismissal of Bayou Fleet's case against Mary and Neal Clulee pursuant to the *Noerr-Pennington* doctrine.

AFFIRM

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Oct 7, 1997

BAYOU FLEET, INC.	CIVIL ACTION
VERSUS	NO. 97-2205
ELLIS ALEXANDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A COUNCIL MEMBER OF THE ST. CHARLES PARISH COUNCIL, ET AL.	SECTION "1" (3)

ORDER AND REASONS

Bayou Fleet, Inc. filed this action on July 14, 1997, asserting claims under 42 U.S.C. § 1983 against Ellis Alexander, individually and as a member of the St. Charles Parish Council ("Council"), Neal Clulee, Mary Clulee, and the Clulee's company Home Place Batture Leasing, Inc. ("Home Place"). Bayou Fleet alleges in its complaint that Alexander engaged in arbitrary and capricious actions which he took under color of state law in furtherance of a conspiracy among himself, the Clulees, and Home Place. The alleged object of the conspiracy was to obtain through a series of zoning challenges, the elimination of Bayou Fleet as a business competitor of the Clulees, and their company.

DATE OF ENTRY OCT 7 1997

On September 8, 1997, subsequent to the filing of this lawsuit, Alexander proposed an ordinance and resolution which the St. Charles Parish Council adopted on September 22, 1997 by overriding the Parish President's vetoes.[1] The next day, Bayou Fleet filed an amended complaint seeking an injunction against the enforcement of these acts, and a declaratory judgment that they are violative of the United States Constitution. Bayou Fleet named the St. Charles Parish Council and the Parish insurer as additional defendants.

Bayou Fleet alleges that Alexander proposed the ordinance and resolution as part of the conspiracy to destroy its business. Bayou Fleet alleges that the procedures used to pass the ordinance and resolution, as well as the substance of the measures are violative of its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. Specifically, Bayou Fleet alleges that the ordinance is unconstitutionally vague, and that both measures violate procedural and substantive due process, the equal protection clause, and the First Amendment right of access to the courts.

Both measures were published on October 1, 1997 and were scheduled to become effective on October 8, 1997, in accordance with the St. Charles Parish Home Rule Charter, Article IV, Section B(3)(f). On October 2, 1997, Alexander introduced Emergency Ordinance No. 97-10-2 to suspend the effect of the ordinance in order to "address the

---

[1] St. Charles Parish Ordinance No. 97-9-6 ("the ordinance") and St. Charles Parish Resolution No. 4416 ("the resolution").

concerns expressed by several corporate citizens regarding the enactment of Ordinance 97-9-6." The council adopted this Emergency Ordinance on October 6, 1997, to be effective immediately. Because the ordinance at issue is merely suspended and not revoked, the court finds that Bayou Fleet's challenge to the ordinance is not moot. Likewise, the Emergency ordinance has no bearing on the resolution challenged herein, which remains scheduled to become effective October 8, 1997.

The court addresses here only the request for a declaratory judgment and injunctive relief against the ordinance and resolution. At a hearing held on September 30, 1997, this court consolidated the hearing on the request for a preliminary injunction with the merits of the request for a permanent injunction and declaratory relief. The court heard testimony from three witnesses offered by Bayou Fleet: Jerome Benoit, Project Manager for Ronald Adams; Chris Tregre, Parish President; and Robin Durant, an owner of Bayou Fleet. The defendants did not offer any witnesses or documentary evidence.

Federal subject matterjurisdiction exists under 28 U.S.C. § 1331 and 1343(a)(3) as this action arises under 42 U.S.C. § 1983.

I. Facts

Bayou Fleet engages in barge and vessel repair, as well as the ownership and operation of sand pits located along the right descending bank of the Mississippi River in Hahnville, Louisiana located in St. Charles Parish. Bayou Fleet has been in operation for about 50 years. Bayou Fleet

accesses its property by crossing the Mississippi River levee.

The present controversy began in 1997 when Ronald Adams Contractors, Inc. ("Ronald Adams") received a contract on a federally-funded road construction project. Ronald Adams contacted Bayou Fleet to negotiate an agreement to lease its sand pits and fill them with approximately 750,000.00 cubic yards of sand to be used in connection with the road construction project. Neal Clulee approached Ronald Adams and attempted to persuade it to let Home Place be the supplier of the sand. Ronald Adams' business records reflect that Clulee told the Ronald Adams Operations Manager that "if [Ronald Adams] used his sand, he could keep authorities 'satisfied' (Sheriff's Dept., Weight Units, etc.). He left the 'rest' unsaid (if we don' t use him) Ronald Adams chose to do business with Bayou Fleet.

Thereafter, Ronald Adams sought and obtained a permit to improve the levee crossing at Bayou Fleet's property. It then applied for a permit to cross the levee. At that point, Alexander challenged Bayou Fleet's non-conforming status on the ground that it had lost that status by non-use. In this context, "non-conforming status" refers to when a business is exempted from compliance with a zoning regulation based on its continuous use (meaning without a break in use greater than six months) of the property after the zoning regulation is enacted, even though its use would be in violation of the new regulation. If Bayou Fleet were determined to have lost its non-conforming status, Bayou Fleet, as well as its customers like Ronald Adams, would not be able to use its sand pits. Home Place would then be the only sand pit in town.

The St. Charles Parish Attorney reviewed affidavits from truck drivers who hauled sand out of Bayou Fleet's sand pits, records of sale, and photos. He issued an opinion letter dated May 21, 1997 to the Coastal Zone Management Authority that there has been continuous use of Bayou Fleet's sand pits and that Bayou Fleet has not lost its non-conforming status.

Next, Bayou Fleet received in the mail a "Public Notice" for a meeting to be held on May 29, 1997 before the Coastal Zone Advisory Committee concerning "Bayou Fleet sand pits" "to consider an application by Ronald Adams Contractor to reopen and operate the existing sandpits in Hahnville." Notices for Coastal Advisory Committee meetings are normally issued by the Council Secretary on official Council stationary; this notice was not. The notice was signed by Alexander and included his home and business phone numbers, as well a personal comment from him encouraging people to attend or discuss the matter with him.

At the Coastal Zone Advisory Committee meeting, Alexander introduced a resolution which was adopted by the Council to offer a letter of objection to the United States Army Corps of Engineers protesting Ronald Adams' application for a permit to dredge and fill Bayou Fleet's sand pits. The Corps of Engineers issued the permit notwithstanding the Council's objection.

On July 1, 1997, Alexander appeared at a meeting of the Lafourche Basin Levee District Board ("Levee Board") and asked them to deny a permit for Ronald Adams to cross the Mississippi River levee and to stockpile sand in Bayou

Fleet's pits. Alexander threatened the Levee Board that if they did not vote his way, he would recommend to the Council that $1.5 million be withdrawn from their funding. Nevertheless, the Levee Board voted in favor of issuing the permit. After the meeting, when Bayou Fleet's owner Robin Durant told Alexander that he did not enjoy immunity for his actions at a Levee Board meeting, Alexander said, "I'm going to get you."

A week later on July 7, 1997, at a meeting of the Council, Alexander asked the Council to deviate from its published agenda to include a resolution for the St. Charles Parish Tax Collection Department to conduct a sales tax audit of Bayou Fleet's sand pit operations and to hold in abeyance the issuance of any sand-pit permits to Bayou Fleet until completion of the audit. Alexander's proposal to deviate from the agenda did not pass, and consequently, his resolution was not considered. Nevertheless, on July 30, 1997, Bayou Fleet received a notice of a sales tax audit, which was subsequently performed for the tax years 1994 through 1996 on all of Bayou Fleet's operations. All sales and sales taxes were found to be proper except for a minimum amount of sales taxes found to be owed where some out-of-state companies had failed to charge Bayou Fleet sales tax on catalogue purchases it had made.

Bayou Fleet filed this lawsuit on July 14, 1997.

At the next Council meeting on September 8, 1997, Alexander proposed the ordinance and resolution at issue here. The official agenda for the September 8 Council meeting lists a resolution described simply as "Special Legal

Counsel (Councilman Alexander." The ordinance made it a criminal act punishable by a fine not exceeding $500.00 and/or imprisonment not to exceed six months for

> any person, firm or corporation to operate any business, or perform any work on or across or use any portion of the Mississippi River levee in the course of the performance of its work without the express written approval of the St. Charles Parish Council.

The resolution called for the appointment of a "Special Legal Counsel" to determine whether Bayou Fleet had lost the non-conforming status of its property. The resolution acknowledged the opinion of the Parish Attorney that Bayou Fleet has maintained its non-conforming status, yet concluded without reaon that it is "in the best interest of the Parish Council and residents of St. Charles Parish to employ Special Legal Counsel to conduct a thorough investigation of "whether or not Bayou Fleet has had a sand pit operation continuously for the past twelve months on property located on the Mississippi River batture in Hahnville" in the course of which investigation the Special Legal Counsel may "subpoena the business records of Bayou Fleet."

At the hearing on the resolution, Alexander made a specific request to appoint Joel Chaisson as the Special Legal Counsel to investigate Bayou Fleet. Chaisson had attended the earlier Coastal Zone Advisory Committee meeting as the legal representative of Home Place. In addition, Chaisson has acted in a role adversarial to Bayou Fleet in prior litigation. As of the date of this court's hearing, no one had been named as Special Legal Counsel.

The Council voted to adopt both the ordinance and resolution, Bayou Fleet did not receive adequate notice of the proposed resolution and did not attend the September 8, 1997 hearing.

The Parish President Chris Tregre vetoed both measures on September 11, 1997. He provided the Council with detailed legal grounds for the vetoes which include some of the same constitutional problems asserted in this lawsuit by Bayou Fleet. He also provided an opinion letter from the Parish Attorney explaining that the resolution exceeds the police power granted to the Parish Council because it is an attempt to override the authority of the State and its Levee Board.

On September 22, 1997, the Council voted to override the vetoes.

On September 27, 1997, Bayou Fleet telefaxed a request to the Council that it be permitted to cross over the levee to attend to business. As of September 30, 1997, when this court held its hearing, Bayou Fleet had received no response from the Council.

II. Analysis

A. Section 1983

42 U.S.C. § 1983 provides remedies for deprivations of constitutionally protected interests. See Baker v. McCollam, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979). Local governing bodies and local officials in their official capacities can be sued under Section

1983 when a party can establish that he or she has suffered a constitutional deprivation as a result of either "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dept. of Social Services, 436 U.S. 658, 690, 91, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

As there is no dispute that Alexander and the St. Charles Parish Council acted under color of state law, the remaining issue is whether the conduct complained of deprived Bayou Fleet of its federal constitutional rights.

B. The Ordinance

1. Police Power

It is not disputed that St. Charles Parish has the authority to enact legislative measures in the exercise of its lawful police powers .[2]

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[2] The Parish of St. Charles is a post-1974 home rule charter government that adopted its charter pursuant to the terms of the 1974 Louisiana Constitution, art. VI, § 5. Under the Louisiana Constitution, a local governmental subdivision may adopt regulations for land use for public purposes subject to uniform procedures established by law. La. Const. art. 6, § 17(D)(1). However, the Louisiana Constitution also recognizes that the exercise of local police power may not abridge the police power of the State, La. Const. art. 6, § 9, it must be exercised reasonably, and just compensation must be provided for the taking of private property for public purposes. La. Const. art. 1, § 4.

Louisiana statutory law expounds on the exercise of police power:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing authority of all

2. Vagueness

Bayou Fleet contends that the ordinance is unconstitutionally vague in violation of the procedural due process guaranty of the Fourteenth Amendment to the United States Constitution.

"[T]he void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 356, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). It is a basic principle of due process that:

> [A} zoning ordinance which contains no standard for the uniform exercise of the power to grant or deny applications for permits is unconstitutional. To be constitutional, a zoning ordinance must be sufficiently definite to notify citizens of their rights pursuant to the ordinance and must establish adequate standards to govern officials with respect to the uniform treatment of applications for permits under the ordinance.

Footnote 2 continued

municipalities may regulate and restrict the ... use of ... land for ... industry ... or other purposes; provided that zoning ordinances enacted by the governing authority of municipalities ... shall be subject to judicial review on the grounds of abuse of discretion, unreasonable exercise of the police powers, an excessive use of the power herein granted, or the denial of the right of due process, provided, further, that the right of judicial review of a zoning ordinance shall not be limited by the foregoing.

See Morton v. Jefferson Parish Council, 419 So.2d 431, 434 (La. 1982)(citations omitted).

In this case, the ordinance provides for criminal penalties. Where a penal enactment fails to provide minimal guidelines for its application, the law may permit authorities to use the statute to "pursue their personal predilections." *See Kolende,* 103 S.Ct. at 1858.

The ordinance does not specify any procedure for obtaining permission from the Council to work on, cross, or use the levy. No objective standards exist for obtaining permission of the Council. An applicant has no way of knowing what he must do in order to obtain the Council's permission. In the absence of any criteria for a business to be approved for a permit, granting or denying a permit is left solely to the subjective opinions and unbridled discretion of the Council members. Decisions may be made on whim or caprice or other inappropriate basis. Both property and liberty interests are at stake in this zoning ordinance. The court finds that the ordinance is unconstitutionally vague.

Having found that the ordinance is void for vagueness, it is not necessary to address the other alleged constitutional violations presented by this ordinance.

La. Rev. Stat. ann. § 33:4721. The St. Charles Parish Home Rule Charter echoes these principles. See Article I; and Article III, Section A (7) (b)

C. Resolution

1. Force of Law

The Parish Charter provides that " [a] n act of the Parish Council which is to have the force of law shall only be enacted by ordinance." (Emphasis added) Charter, Article IV, Section A. It also provides that "[a]n act of the Parish Council which is not to have the force of law may be enacted by resolution." (Emphasis added) Charter, Article IV, Section H. It further provides that " [t]he Council shall cause each ordinance and resolution having the force and effect of law and each amendment to this Charter to be printed or otherwise reproduced." Charter, Article IV, Section F(2).

The resolution was published in the Official Parish Journal on October 1, 1997 as an official proceeding of the St. Charles Parish Council. The resolution was re-printed and at the bottom the following notice appears: "Resolution approved and shall become law irrespective of the veto of the Parish President."

Considering these facts, the court finds that "resolutions" of the Council are not invariably without the force and effect of law. Regardless of whether an act is called an "ordinance" or a "resolution," and notwithstanding the Charter provision that an act which has the force of law shall only be enacted by ordinance, the court finds that a resolution such as the one in this case has the force of law if it is accorded the same formalities as an ordinance and is published in the official journal as "law." See Little v. City of North Miami, 805 F.2d 962, 966-67 (11th Cir. 1986).

2. Equal Protection

Bayou Fleet contends that the resolution violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it singles out Bayou Fleet for unique treatment from others in a similar position.

The equal protection clause requires that a state and its subdivisions apply legislation and actions evenhandedly to all persons similarly situated in a designated class. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) . A violation of equal protection does not require proof of a deprivation of life, liberty, or property, and does not necessarily require that Bayou Fleet belong to a particular group of individuals. Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995).

A violation of equal protection may be shown where a person who is not a member of a particular group of individuals, is deliberately singled out for disparate treatment from others similarly situated based on impermissible considerations such as to punish the exercise of constitutional rights or malicious or bad faith intent to injure. Esmail, 53 F.3d at 180; Rubinovitz v. Rogato, 60 F.3d 906, 909-10 (1st Cir. 1995); LeClair v. Saunders, 627 F.2d 606, (2nd Cir. 1980). Such situations can create an illegitimate "class of one." Esmail, 53 F.3d at 180 ("A class of one is likely to be the most vulnerable of all").

The level of scrutiny to which the court subjects the resolution depends on whether the resolution affects either a suspect class or a fundamental right. If the challenged action

does not involve either of the two, it will be subject to the traditional standard of review which requires only that the action bear some rational relationship to a legitimate purpose. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 1300, 36 L.Ed.2d 16 (1973). Where the differing treatment impinges upon a fundamental right or disadvantages a suspect class, the governmental conduct is subject to a heightened level of scrutiny and will be sustained only if "suitably tailored to serve a compelling state interest." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

Bayou Fleet contends that the resolution treats it differently from Home Place, which is a similarly situated business, and is without a rational relationship to a legitimate governmental purpose. Bayou Fleet contends that it is being singled out for disparate treatment based on the filing of this suit in violation of its First Amendment right to bring this lawsuit, and for the malicious and arbitrary purpose of eliminating Bayou Fleet as a competitor of Home Place.

The evidence shows that Bayou Fleet and Home Place are in the same business of leasing sand pits located on batture property between the Mississippi River and its levee in Hahnville, Louisiana. Indeed, their businesses are located next to each other along the batture.

During the 1980's, after a five-year period of inactivity at Home Place's sandpit (5-year old willow trees were growing in the pit), Home Place's non-conforming status was challenged by a Council member, now Parish President.

The challenge failed, and Home Place was permitted to resume operations. At no time was a resolution passed to investigate Home Place's non-conforming status or subpoena its business records. The Parish President testified that the Council's resolution to investigate and subpoena Bayou Fleet's business records is an unprecedented action which the Council is not empowered to take.

The court finds that Bayou Fleet has shown that it has been singled out for disparate treatment from others similarly situated.

The resolution implicates both a fundamental right and a nonsuspect class.

In filing this lawsuit, Bayou Fleet engaged in a "form of political expression" entitled to First and Fourteenth Amendment protection. In re Primus, 436 U.S. 412, 428, 98 S.Ct. 1893, 1902, 56 L.Ed.2d 417 (1978). This protection forbids the imposition of retaliatory sanctions designed to punish the legitimate exercise of First Amendment rights. Perry v. Sindermann, 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972); Hall v. Sutton, 755 F.2d 786, 787 (11th Cir. 1985); Muir v. Alabama Educational Television Comm., 688 F.2d 1033, 1037 (Sth Cir. 1982), cert. denied, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). A municipality, like any state governmental entity, may not retaliate against an individual because of that person's legitimate use of the courts. See Hall, 755 F.2d at 787.

The evidence shows that Bayou Fleet's sand pit has

been in continuous operation for many years. The evidence further shows that since Home Place lost the Ronald Adams' contract to Bayou Fleet, Council member Alexander has relentlessly attempted to prevent Bayou Fleet from operating its sand pit by challenging its non-conforming status, by opposing issuance of a permit from the Army Corps of Engineers, and by opposing issuance of a permit from the Levee District. He threatened the Levee District with withdrawal of $1.5 million in funding if they did not vote his way. After that, Alexander threatened Bayou Fleet's owner that he would "get him." He then attempted, unsuccessfully, to have the Council amend it agenda to address a proposed sales tax audit of Bayou Fleet and to stay any sand-pit permits. Bayou Fleet had no notice of this proposal. Bayou Fleet filed this lawsuit one week later. Two weeks after filing suit, Bayou Fleet received a tax audit notice, notwithstanding the Council's refusal to take up the issue at its July 7 meeting. At the next Council meeting, Alexander proposed the resolution at issue here. He also proposed that Home Place's attorney Joel Chaisson be appointed to investigate Bayou Flet. At no time did Alexander or the Council provide adequate notice to Bayou Fleet of the proposed resolution.

Of course, an official's dogged opposition to a particular company's operations does not in itself establish that the official's proposed enactments are based on federally impermissible considerations. In this case however, the record does not establish any legitimate basis for Alexander's actions.

There is no evidence before the court that Bayou Fleet's operations have caused any problems in the commu-

nity. Robin Durant's uncontradicted testimony establishes that the resolution was part of the scheme to eliminate Bayou Fleet's business so that Home Place would be the only sand pit in town. The court can discern no legitimate reason for this treatment. There is no evidence before the court that Bayou Fleet's operations have caused any problems in the community.

The resolution itself provides no compelling or rational basis for its enactment. The resolution acknowledges that the Parish Attorney rendered a legal opinion that Bayou Fleet has maintained its property's non-conforming status, yet concludes without explanation that a Special Legal Counsel should be hired and bestowed with subpoena power to conduct an investigation of Bayou Fleet's non-conforming status.

The evidence shows that the Parish Counsel conducted a thorough investigation of Bayou Fleet's property use, including examination of three years of documentation. The evidence supports the Parish Counsel's conclusion that Bayou Fleet did not lose its non-conforming status. The defendants offered no evidence or argument to show why another investigation through a specially appointed legal counsel is warranted.

The court finds based on the events leading up to the proposal of this resolution, that Bayou Fleet has been targeted for disparate treatment maliciously and arbitrarily designed to put Bayou Fleet out of business. The uncontested evidence of repeated failure to provide Bayou Fleet adequate notice of proceedings, Alexander's verbal threat to

the Levee District, his unsuccessful proposal for a sales tax audit immediately followed by a sales tax audit, and his proposal that Home Place's attorney be appointed as the Special Legal Counsel to investigate Bayou Fleet, support finding that the resolution was proposed in retaliation for the filing of this suit, and with a bad faith intent to injure Bayou Fleet.

Equal protection does not require government to treat all identically situated individuals identically, but prohibits unequal treatment which is solely the result of vindictiveness. Esmail, 53 F.3d at 179. "[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational, or plainly arbitrary." Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). Accordingly, the court finds neither a compelling nor a rational basis for the resolution. As a result, the court finds the resolution violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Accordingly, it is not necessary to address Bayou Fleet's other constitutional challenges.

3. Ultra Vires

The provisions of the Home Rule Charter do not permit the action taken by the Council to subpoena and investigate a business.

Article III, Section A (7)(c)(iv) provides that:

> Without limitation of the foregoing authority or other powers given to it by the Charter, the Council may:
>
> iv. Make investigation of Parish affairs and make

> inquiries into the conduct of any department, office, agency or special district of the Parish, including the investigation of the accounts, records and transactions of the department, office, agency or special district; and for the purpose of investigation, subpoena witnesses, administer oaths, take testimony and require the production of books, papers and other evidence; and any person who fails or refuses to obey any lawful order of the Council shall, upon conviction, be punished in such manner as the Council shall fix by ordinance.

Thus, the Council's authority to conduct investigations is limited to governmental matters, and does not include the power to investigate private individuals. Likewise, the acts authorized for enactment by resolution do not include the power to conduct investigations.

Article IV, Section H provides:

> An act of the Parish Council which is not to have the force of law may be enacted by resolution. Acts which may be adopted by resolution shall include but shall not be limited to one which:
>
> 1. Establishes a commemorative day, week, month or year;
>
> 2. Authorizes a person to sign or execute on behalf of the Parish Council a contract which has been previously approved;
>
> 3. Authorizes a person to execute, sign or countersign a check or draft on an account of the Parish Council;

4. Declares a statement of public policy of the Parish Council.

The appointment of a Special Counsel to conduct an investigation and subpoena Bayou Fleet's records is an act well-beyond the administrative and ministerial nature of the acts authorized to be enacted by resolution.

III. Conclusion

The court finds and declares that the ordinance is void for vagueness, and that the resolution violates the equal protection clause of the Fourteenth Amendment to the United States and was enacted without authority.

A declaratory judgment may give rise to injunctive relief in order to effectuate the remedy. 28 U.S.C. § 2202. Although this court may issue an injunction against the defendants and all officials who seek to enforce the unconstitutional provisions, the court will not entertain such a remedy at this time. Declaratory relief is a responsible alternative to the strong remedy of an injunction. The court anticipates that it will be respected. See Poe v. Gerstein , 417 U.S. 281, 94 S.Ct. 2247, 41 L.Ed.2d 70 (1974).

Accordingly,

IT IS ORDERED that the court hereby declares St. Charles Parish Ordinance No. 97-9-6 and St. Charles Parish Ordinance No. 4416 unconstitutional for the reasons set forth herein.

The plaintiffs' request for injunctive relief is hereby denied without prejudice.

New Orleans, Louisiana this 7th day of October, 1997.

/s/ Henry A. Mentz
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed SEP 29, 1999

BAYOU FLEET, INC.	CIVIL ACTION
VERSUS	NO. 97-2205
ELLIS A. ALEXANDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ST. CHARLES PARISH COUNCIL, ET AL.	SECTION "1" (1)

MEMORANDUM OPINION

Plaintiff Bayou Fleet, Inc. filed this action for monetary, injunctive, and declaratory relief alleging civil rights violations under 42 U.S.C. § 1983, antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state law violations of the Louisiana Unfair Trade Practices Act, La. Rev. Stat. ann. § 15:1401, et seq. Bayou Fleet named as defendants, Ellis Alexander, individually and as a member of the St. Charles Parish Council, St. Charles Parish, Coregis Insurance Company, Neal Clulee ("Clulee") and his wife Mary Clulee (referred to herein jointly as "the Clulees"), and two companies owned by the Clulees, Homeplace Batture

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Leasing, Inc. ("Homeplace") and NIC Materials, Inc.[1]

Bayou Fleet claims that Alexander and the Clulee defendants acted jointly and in conspiracy to put Bayou Fleet out of business through a series of arbitrary and capricious zoning challenges, permit challenges, and a sales tax audit which render them liable under section 1983 for violation of its rights to due process and equal protection of the law under the Fourteenth Amendment, and under the Sherman Act for conspiring and attempting to restrain trade and monopolize the river sand business. Bayou also claims that after it filed the present lawsuit, Alexander and the Clulee defendants continued to act jointly and in conspiracy to put Bayou Fleet out of business by adopting a criminal ordinance referred to herein as the "Levee Law," and the adoption of a resolution to appoint a "Special Legal Counsel" to determine whether Bayou Fleet had lost the non-conforming status of its property in violation of the same constitutional and statutory provisions above, as well as its First Amendment right of access to the courts. Bayou Fleet claims damages for loss of income due to delays in the permitting process allegedly caused by the conspirators, treble damages, attorney fees, and punitive damages.

After a trial on the merits of Bayou Fleet's request for a preliminary and permanent injunction, this court declared the Levee Law ordinance and the resolution to appoint Special Legal Counsel unconstitutional. See Bayou Fleet, Inc. v. Alexander, 1997 WL 625492 (E.D. La. Oct. 7, 1997).

[1] Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc. and N/C Materials, Inc. are referred to herein, in globo, as the "Clulee defendants."

The Parish Council subsequently voted to rescind the ordinance and resolution. Shortly before trial of the defendants' liability, Bayou Fleet settled its dispute with Alexander, St. Charles Parish, and Coregis Insurance Company. The remaining issues before the court are the liability of the Clulee defendants for the alleged violations of antitrust, civil rights, and state unfair trade practice laws and damages, if any.

FACTS

Plaintiff Bayou Fleet owns and operates sand pits located on the batture along the right descending bank of the Mississippi River in Hahnville, Louisiana, in St. Charles Parish. Bayou Fleet is a family-owned company represented at trial by one of the family members, Robin Durant.

Defendants Homeplace and NIC Materials are also family-owned companies in the sand pit business. Neal and Mary Clulee are the owners of Homeplace and NIC Materials. Homeplace owns a sand pit on the batture just down river from Bayou Fleet. Homeplace leases in part to NIC Materials, which handles the sales and trucking of the sand.

In 1981, Bayou Fleet's sand pit and the sand pit now owned by Homeplace were zoned B-1, which did not permit the operation of sand pits. Because both sand pits were in operation prior to the creation of that zoning classification, the sand pits were grandfathered to allow continued operations as a non-conforming use, provided that the sand pit activities were not suspended for a period of six months.

Bayou Fleet and the Clulee defendants are competitors in the sand business. They are the only active sand pit businesses in the greater Hahnville area. In between Bayou Fleet's and Homeplace's sand pits is a non-operating sand pit owned by the Giambelluca family. The sand pits are adjacent to residential areas of Hahnville. Two other sand pit businesses operate in the same market, but in the nearby town of Waggaman, Louisiana.

The Durants and the Clulees have a history of litigation over the years, as described below. The present controversy began in 1997 when Ronald Adams Contractors, Inc. ("RAC") obtained a Louisiana road construction contract which required a source of approximately 750,000 cubic yards of river sand for the job. The following is a chronology of the facts of what occurred when RAC undertook to acquire the sand.

RAC wanted to source its own sand by dredging the Mississippi River and stockpiling it in a sand pit. RAC sought quotes from Clulee and Durant to use their sand pits to stockpile the sand and haul out as needed for the project. RAC ultimately decided to use the Durant/Bayou Fleet sand pits.

In order to dredge sand from the Mississippi River, RAC had to obtain a permit from the U. S. Army Department Corps of Engineers. A permit is also needed from the Lafourche Basin Levee District Board of Commissioners (hereinafter "Levee Board") to operate a

sand pit, meaning pumping, stockpiling, and hauling sand across the levee. A permit to operate Bayou Fleet's sand pit was held by a company called Vulcan, which offered to name RAC as licensee. RAC declined because it wanted all permits in its own name. If the Levee Board denies a permit to operate, the Corps of Engineers is required by regulation to deny a permit to dredge.

RAC started the permitting process in March, 1997. By resolution adopted April 3, 1997, the Levee Board issued a permit to RAC to make improvements to the levee crossing to Bayou Fleet's sand pits. On April 4, 1997, RAC submitted an application to the Corps of Engineers for a permit to dredge the Mississippi River. About this same time, it became apparent that there were neighborhood concerns about the project. The Corps of Engineers' file shows a flurry of complaints during this period from residents opposing the RAC permit. The evidence established that sand pit operations in general can cause public health problems from air pollution and safety risks, as well as nuisances to neighbors.

Andrew Courreges, RAC's operations manager, and Durant met with Alexander at Durant's office to assure him that they would make a good effort to abate potential problems for the community. Durant told Alexander that his pit was in operation and permitted. Alexander indicated that he would support the project.

Telephone records show a one-minute phone call

from Clulee's home to Alexander's home on April 28, 1997.[2] Clulee recalls speaking with Alexander during this period about the status of Bayou Fleet's non-conforming use and the RAC permits. On approximately the same date, Alexander telephoned the Director of the Department of Planning & Zoning ("P & Z"), Earl Matherne, to advise him of his constituents' objection to the operation of Bayou Fleet's sand pits. He also advised Matherne that the residents were willing to testify that Bayou Fleet's sand pits had lost their non-conforming use because they had been shut-down for more than six months.

In response, Matherne advised RAC that it might have zoning problems with using Bayou Fleet's sand pits. On May 5, 1997, Matherne requested a legal opinion from Randy Lewis, Parish Attorney, regarding whether Bayou Fleet had lost it's nonconforming use by abandonment. Lewis investigated the issue, including reviewing documents voluntarily produced by Bayou Fleet, such as sales records and affidavits from truck haulers.

If Bayou Fleet had lost its non-conforming use, RAC would either have to use a different sand pit, or Bayou Fleet would have to try to get Bayou Fleet's property re-zoned.

On May 17, 1997, Courreges set up a meeting between himself, another RAC employee, and Clulee, to discuss purchasing sand from Homeplace's pit. They discussed

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[2] The court finds that none of the one-minute phone calls in this case involved any conversation, but show only that a call was made where an answering machine picked up.

the particulars of Clulee's bid. Courreges mentioned that he had received a letter in which Clulee questioned the project. Clulee explained that his only problem with the project was RAC's proposed dredging in front of his property. Courreges felt that Clulee seemed to have a lot of knowledge about the progress of RAC's permit applications. Clulee told Courreges that if RAC used his sand "he could keep local authorities 'satisfied' (sheriff's dept., weigh units, etc.) and "left the 'rest' unsaid if [RAC did] not use him."[3]

RAC decided to stick with Bayou Fleet.

On May 21, 1997, the Parish Attornev issued his opinion letter that Bayou Fleet had not lost its non-conforming use. Alexander disagreed with that opinion.

The St. Charles Parish Coastal Zone Advisory Committee (hereinafter nCZACII), an eight-member committee that makes recommendations to the Parish Council. on wetlands and environmentally- related permit applications within the Parish, had on its May 29, 1997 agenda, inter alia, the RAC permit application before the Corps of Engineers. The CZAC was to decide whether to recommend to the Parish Council that it submit a letter of objection or no objection to the Corps. Alexander prepared and mailed to everyone in the immediate area of the Bayou Fleet sand pits a notice of that meeting. The CZAC published an official notice as well.

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[3] The quoted language is from a sununary of the conversation made by Courreges on an RAC "Standard Conversation Form."

Bayou Fleet received a copy of Alexander's notice. Durant was surprised by it because his prior meeting with Alexander led him to believe that Alexander would support the RAC project.

Alexander asked Clulee to attend the CZAC hearing, but he could not attend, so Clulee had his attorney Joel T. Chaisson (a retired state district court judge), attend on behalf of Homeplace. Alexander, Chaisson, and seven members of the public spoke in opposition to the project, their main concerns being dust, noise, increased industrial traffic on a substandard roadway, and the sand pits, alleged loss of its non-conforming use. The citizens also presented a petition with forty signatures against "the reopening of sand pits in Hahnville." There is nothing unusual about members of the public or Parish Council members presenting their views at a CZAC meeting. CZAC meetings are televised. Durant did not attend the hearing.

Phone records establish that on the day of the CZAC hearing, there were two phone calls from Clulee's home to Alexander's home -- one for eight minutes and another for 12 minutes.

On May 30, 1997, the CZAC issued a recommendation to the Parish Council that a letter of no objection be issued to all concerned agencies.

On the same date, Mary Clulee wrote a letter on behalf of Homeplace to the Corps of Engineers objecting to RAC's permit application "on the basis that their proposed

dredging area extended the entire length of our property." She further stated: "I feel that there is enough dredging area in the immediate area frontage fill of their site."

At the regularly scheduled June 2, 1997 meeting of the Parish Council, Alexander introduced a resolution calling for the Parish to issue a letter of objection to the Corps of Engineers based on concerns of air pollution and its effects on persons with medical problems such as asthma and emphysema, industrial congestion, noise, and dangers to children playing in the unfenced sand pits.[4] Alternatively, the resolution requested the Corps. to stipulate conditions for issuance of the permit that would ease neighborhood concerns.[5] One of the alternative conditions was for the trucks to drive behind the levee and exit at Homeplace's ramp to avoid driving along the river road near the residential areas. Because no such road existed, Durant believed that this condition was a subterfuge to block the deal with RAC. This resolution in effect would reject the recommendation of the CZAC that the Parish issue a letter of no objection. The Parish Council voted with one dissent to adopt

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[4] A child had been killed at Bayou Fleet's property while tunneling into sand piles.

[5] Such as: limiting operations to daylight hours, requiring level truck loads and covered truck beds, limiting the height of the stockpiles to the height of the levee, wetting ramps three times a day, fencing the stockpile, installing asphalt ramps over the levee, lowering the speed limit to 25 mph, installation of truck crossing signs, requiring sand hauling trucks to access the pits by traveling behind the levee.

Alexander's resolution of objection. Durant attended this meeting; the Clulees did not.

After the May 29 CZAC meeting and prior to the June 2 Parish Council meeting, there were four phone calls from the Clulee's home to Alexander's home -- two for one minute each, one for nine minutes, and one for seven minutes -- for a total talk time of 16 minutes.

By letters dated June 4, 1997, Alexander forwarded the Parish Council's objection to Senators Mary Landrieu and John Breaux asking for their support of the citizens' opposition to the RAC permit application before the Corps of Engineers. Both Senators responded by asking the Corps of Engineers to provide them with information about the project.

By letters dated June 5 and 6, 1997, Alexander requested P & Z and Chris Tregre, the Parish President, to advise him of the status of Bayou Fleet's non-conforming use.

By letters dated June 5 and 6, 1997, Alexander informed the Levee Board of the Parish Council's resolution to object. Alexander requested the Levee Board to rescind its prior permit for RAC to make improvements to Bayou Fleet's levee crossing and to deny RAC's pending operations permit application based on the harmful impact of the proposed operations on the residential community.

After considering the opposition Alexander presented, the Levee Board voted on June 5, 1997, to deny RAC an

operations permit -- (a permit to pump, stockpile, load, and haul sand over the levee).[6] Alexander promptly informed the Corps of Engineers of the Levee Board's decision. Because the Levee Board's denial meant automatic denial of a dredging permit from the Corps of Engineers, RAC requested the Corps to postpone decision on his application until he had a chance to defend his permit application before the Levee Board.

In the meantime, Durant had a friend, who was a fraternity brother of U.S. Congressman Robert Livingston, write to the Congressman to help expedite the Corps of Engineers' permit process. Livingston did write a letter to the Corps on June 24, 1997, but later in September, 1997 (after the Corps had granted the permit) withdrew his letter as he realized that the matter was not within his district, but the district of Congressman William J. Tauzin.

RAC wrote to Homeplace/Mary Clulee on June 27, 1997, assuring her that it did not intend to dredge in front of Homeplace's property.

On July 1, 1997, RAC and Durant attended a second meeting of the Levee Board and obtained a reversal of its decision to deny the operation permit. Alexander was also present. After the meeting, Alexander and Durant had a heated exchange. Durant informed Alexander that he did not have any immunity for his actions before the Levee Board; Alexander replied: "I'm going to get you. The Clulees did not attend this meeting.

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[6] This operations permit was the same kind held by Vulcan which RAC chose not to operate under.

After the June 2, 1997 meeting of the Parish Council and prior to the July 1, 1997 meeting of the Levee Board, there were two phone calls from the Clulee's home to Alexander's home -- one for one minute and one for six minutes -- for a total talk time of six minutes.

On July 3, 1997, Mary Clulee wrote a second letter on behalf of Homeplace to the Corps of Engineers asking that RAC amend the drawings of its proposed dredging area in accordance with its letter to her that it would not dredge the area next to her property.

At the July 7, 1997 meeting of the Parish Council, Alexander proposed a resolution to have a sales tax audit performed on Bayou Fleet. The resolution was rejected.

Two days before that Parish Council meeting there was a six minute phone call from the Clulee's home to Alexander's home.

Bayou Fleet filed the present lawsuit on July 14, 1997.

Despite the Parish Council's rejection of Alexander's proposed sales tax audit resolution, Alexander spoke to the head of St. Charles Parish Tax Collection Department, R.J. Lorio, about Bayou Fleet's payment of sales taxes. On July 30, 1997, Lorio issued notice of a sales and use tax audit to Bayou Fleet. Bayou Fleet cooperated with the audit, which did not result in any citations for failure to pay taxes.

After the July 7, 1997 meeting of the Parish Council

and before the July 30, 1997 tax audit notice, there were two one-minute phone calls from the Clulee's home to Alexander's home.

The Corps of Engineers issued a dredging permit to RAC on July 21, 1997, under four months from the date of application. This would have been the last permit RAC needed to begin operations at Bayou Fleet, but P & Z in discussions with the Parish President, who was historically opposed to sand pit operations, raised questions about and ultimately determined that RAC would have to apply for a "Change of Occupancy" permit for the Bayou Fleet site. No one challenged this permit, which was issued on September 22, 1997. No more permits were required in order for RAC to begin operations.

There is no evidence that the Clulee defendants or Alexander played any role in P & Z's decision to require this permit or in the length of time it took to obtain the permit. The evidence that on August 15, 1997, an unsigned, form affidavit was telefaxed between the Chaisson and Chaisson law firm and Alexander's home does not show that the Clulee defendants or Alexander were involved in the Change of Occupancy permit. The affidavit related to the issue of Bayou Fleet's non-conforming use and was to be used by residents in the immediate area of the sand pits who believed that Bayou Fleet's sand pits had ceased operations for a period of time. No one ever signed the affidavit, nor is there any evidence that Alexander or the Clulee defendants

ever attempted to have any on sign the affidavit.[7]

Alexander introduced the Levee Law ordinance and the Special Legal Counsel resolution at the September 8, 1997 meeting of the Parish Council. The Levee Law would have made it a criminal offense for any person to cross over the levee without written permission of the Parish Council. The resolution acknowledged the opinion of the Parish Attorney that Bayou Fleet had maintained its non-conforming use, yet concluded without explanation that "it is in the best interest of the Parish Council and residents of St. Charles Parish to employ Special Legal Counsel to conduct a thorough investigation" of "whether or not Bayou Fleet has had a sand pit operation continuously for the past twelve months on property located on the Mississippi batture in Hahnville." The resolution empowered the Special Legal Counsel to "subpoena the business records of Bayou Fleet." Alexander requested that Joel Chaisson, counsel for Homeplace, be selected to serve as Special Legal Counsel.

Notice of these proposed acts was published in the local newspaper. The notice of the Special Legal Counsel resolution did not mention that it was directed at Bayou Fleet. Bayou Fleet did not have adequate notice of the proposed resolution. Neither Bayou Fleet, nor the Clulee defendants attended the September 8, 1997 Parish Council meeting.

The Parish Council voted to adopt both the ordinance and the resolution, but the decision as to whom to

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[7] The affidavit was the second page of the fax transmission. Alexander was not able to produce the first page of the fax in discovery, Typically, the first page of a telefax is a cover sheet with only the name of the sender, the sender's fax number, and the number of pages telefaxed. For this reason and because the affidavit was never used, the court rejects

appoint as Special Legal Counsel was deferred pending receipt of a contract.

Parish President Chris Tregre vetoed both measures on September 11, 1997 because he believed the Parish Council had acted beyond its authority. On September 27, 1997, the Parish Council voted to override the vetoes, however, the acts never became law. After this court declared the acts unconstitutional, the Parish Council voted to rescind them.

After the July 30 tax audit letter and prior to the September 8, 1997 meeting of the Parish Council, there were 5 phone calls from the Clulees' home to Alexander's home -- 4 one-minute calls and one 18 minute call -- for a total talk time of 18 minutes. Between September 8, 1997 and the September 22, 1997 override vote, there were three phone calls from the Clulees' home to Alexander's home -- each for one minute.

RAC wanted to place a small 6 by 6 foot guard house on the property, which required a permit. The pendency of this permit application did not prevent RAC from dredging and stockpiling sand. There is no evidence that anyone challenged the issuance of this permit; however, P & Z did request an opinion from the Parish Attorney as to whether the shack would present an expansion of the non-conforming use. There is no evidence that the Clulee defendants or Alexander played any role in this permit process. Once the Parish Attorney issued his opinion that it would have no effect on their non-conforming use, and the Fire Marshall approved the structure, P & Z issued RAC a permit on October 16, 1997 to install the guard shack.

(footnote 7 continued) Bayou Fleet's argument that the absence of the first page should create an adverse inference against the Clulee defendants.

RAC competed its project on time. The evidence establishes that it took RAC approximately 110 days to obtain the Corps of Engineers' permit, and approximately six months to obtain all permits necessary to commence operations. In comparison, when Homeplace applied for the same kind of dredging permit from the Corps of Engineers in January, 1998, it took over ten months to obtain the permit, notwithstanding that the Parish Council unanimously adopted a resolution to issue a letter of no objection.[8] Even considering the evidence that for two to three months the Clulees delayed the process by failing to take any action on their permit application, RAC's dredging permit application was approved in far less time.

Neal Clulee made a total of 46 telephone calls from his home to Alexander's home in 1997. The 1997 phone calls commenced on April 28, 1997, admittedly because of RAC's permit applications before the Corps of Engineers and the Levee Board, and continued until December 30, 1997. Twenty-eight of the 46 calls were one minute calls with no conversation. Prior to this lawsuit being filed, the records show seven phone conversations totaling 58 minutes between Clulee and Alexander.

Clulee did not recall specific phone conversations. He admitted discussing the RAC permits and his belief that Bayou Fleet had lost its non-conforming use. He explained that several calls were unrelated to Bayou Fleet and involved matters such as resident complaints about his business operations, a diversion project in St. Charles Parish, and the asphalt ramp the Parish required him to install. Clulee

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[8] Alexander abstained from voting.

recalled speaking with Alexander on other occasions about the sand pit business in general. Alexander was trying to educate himself about the operations and the permitting process. Clulee thinks most of the phone calls were made as a result of the lawsuit being filed against him and Alexander. Indeed, there were only 15 phone calls totaling 58 minutes prior to the lawsuit being filed; whereas there were 31 phone calls totaling three hours and five minutes after the lawsuit was filed. Some of the calls Clulee made were to return calls initiated by Alexander to Clulee's beeper.

In addition to these permit and legislative processes, the court considers the parties' following history of litigation as relevant to the claims herein.

In the 1984, one of the Durant family companies sued Clulee personally to collect a debt and obtained a judgment in excess of $100,000. Durant's company filed a lien on Clulee's property and the sheriff foreclosed on Clulee's home. Durant's company purchased Clulee's home at the sale.

Also, in 1984, a dispute arose regarding the non-conforming use of the Clulees' sand pit. Both Chris Tregre, a Parish Council member at the time and now Parish President, and the Durant family, tried to stop the pit operations on the ground that the nonconforming use had been abandoned for five years. Tregre was acting pursuant to his constituents' opposition. Tregre attended hearings to voice his opposition and spoke to the parish president about it. No legislative acts such as the resolutions and ordinance at issue here were proposed.

Another sand pit feud began in 1989 between the Clulees and the Giambellucas, who owned the pit in

between Bayou Fleet and Homeplace. The court takes judicial notice of the facts of that dispute as set forth in *Giambelluca v. Parish of St. Charles*, 687 So.2d 423 (La. App. 5th Cir. 1996). Briefly, the dispute centered around the use of a levee ramp that was the only access to the Giambelluca property. After two lawsuits, one of which was presided over by Joel Chaisson (now Homeplace's attorney), who ruled in favor of the Clulees, a Parish ordinance sponsored at the request of Clulee by Alexander, and destruction of the ramp by Clulee, the Giambelluca property was left without road access and was forced out of business. The Giambelluca sand pit has been out of business ever since Clulee had the ramp torn up, leaving Homeplace and Bayou Fleet as the only sand pits operating in Hahnville.

Another sand pit lawsuit was brought by one of the Durant family companies, LA Materials, to have the Clulee sand pit closed based on loss of non-conforming use. LA Materials withdrew the suit when the operating company, Westside Sand, claimed that LA Materials was trying to monopolize the sand business.

Bayou Fleet urges the court to impose an adverse inference against the defendants because Mary Clulee, a will call witness for the defense, did not testify. The Fifth Circuit has described the adverse witness rule as an "archaism" for which there is no longer any justification, particularly where the witness could have been called by either party, as in the present case. See Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1048-49 (5th Cir. 1990). In any event, the adverse witness rule is discretionary. See Evangeline Refining Co. v. Charles N. Wooten, Ltd., 890 F.2d 1312, 1320 (5th Cir.

1989). The court finds that Mary Clulee's testimony would have offered no information that the court did not already have before it. Her testimony likely would have been cumulative to her husband's testimony. Moreover, the evidence from all the witnesses failed to show that she was personally involved in any of the alleged violations. See id. (quoting II J. Chadbourne, *Wigmore on Evidence* § 287) Mary Clulee was present during the entire trial, and Bayou Fleet could have called her as a witness. Finally, the court notes that Bayou Fleet did not raise this issue at trial. Under the circumstances of this case, the court declines to invoke the adverse witness rule.

ANALYSIS

A. Noerr-Pennington Doctrine

The Clulee defendants contend that they are immune from liability pursuant to the Noerr-Pennington doctrine.[9] See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed.2d 464 (1961): United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). The doctrine, which was developed by the Supreme Court in the

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9 The court may consider the Noerr-Pennington doctrine with respect to the liability of the Clulee defendants even though they did not assert the doctrine in their answer. The court raised the issue sua sponte a few weeks prior to trial and ordered the parties to brief the issue. The Clulee defendants then included the issue in the pre-trial order, over Bayou Fleet's objection. It has been held that the Noerr-Pennington doctrine is not an affirmative defense in the sense that it is the plaintiff's burden to prove the substantive violation claimed, which cannot be done where the defendant's allegedly wrongful conduct consists of petitioning the

context of antitrust law, has its underpinnings in First Amendment principles that the right to petition the government legislatively, judicially, or administratively is constitutionally protected speech regardless of its motivation. Noerr, 365 U.S. at 138, 81 S. Ct. at 530; Pennington, 381 U.S. at 669-70, 85 St. Ct. at 1593. "The essence of the doctrine is that parties who petition the government for government action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." Video Int'l Production v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988), cert. denied, 491 U.S. 906, 109 S.Ct. 3189, 105 L.Ed.2d 697 (1989).

Although the Noerr-Pennington doctrine was originally applied in the antitrust context, it has been applied to protect First Amendment petitioning of the government from claims brought under federal and state laws, including section 1983. Id. at 1084. See e.g., Gorman Towers, Inc. V. Bocloslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (section 1983) (landowners, secret meetings with city officials and

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Footnote 9 cont. ...government. See PrimeTime 24 Joint Venture v. National Broadcasting Co., Inc., 21 F. Supp. 2d 350, 355 (S.D.N.Y. 1998)(citing 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 207c (rev. ed. 1997)); See also McGuire Oil Co. v. Mapco, Inc., 958 F.2d.1552, 1558 n. 9 (11th Cir. 1992) (Citing Areeda and H. Hovenkamp). Certainly, there would be no justification for the court to reject application of the doctrine on a procedural error, where to do so would abridge the defendant's First Amendment rights. Here, where Bayou Fleet was given adequate advance notice of the court's intent to consider the issue, and where the doctrine was asserted in the pre-trial order, it is appropriate to consider the Noerr-Pennington doctrine as it may apply in this case.

petitioning for enactment of city ordinance to rezone plaintiff's property) (citing Sawmill Products, Inc. v. Town of Cicero, 477 F.Supp. 636, 642 (N.D.Ill. 1979) (section 1983) (protesting presence of plaintiff's sawmill which was then shut down by town ordinance) ; Weiss v. Willow Tree Civic Ass'n, 467 F.Supp. 803, 816-18 (S.D.N.Y. 1979) (section 1983) (lobbying town officials and filing groundless judicial and administrative complaints to oppose zoning permit); Aknin v. Phillips, 404 F.Supp. 1150, 1153 (S.D.N.Y. 1975), aff'd, 538 F.2d 307 (2d Cir. 1976) (section 1983) (urging officials to enforce unconstitutionally vague noise ordinance against plaintiff's discotheque); Sierra Club v. Butz, 349 F.Supp. 934, 938-39 (N.D.Cal. 1972) (contractual interference) (filing lawsuit and administrative appeals to halt plaintiff's logging operation; filings constitutionally privileged even if motivated by malice)). Bayou Fleet's claims under section 1983 and the LUTPA are all based on the same events as the antitrust claims.

Bayou Fleet has accused the Clulee defendants of lobbying and influencing state and federal officials in private meetings, telephone calls, letters, and public hearings to deny permits, revoke Bayou Fleet's non-conforming use, and enact ordinances and resolutions, all designed to put Bayou Fleet out of business. Pursuit of that goal using the administrative and legislative channels and procedures that the Clulee defendants did was within their First Amendment rights. Their actions are nothing more than protected First Amendment activity to procure favorable government actions. They have the right to advance their opinions to government officials about Bayou Fleet's or RAC's business, whatever the underlying motive. Indeed, Bayou Fleet and other Durant family companies have pursued similar actions

against the Clulees such as filing objections to permits and a lawsuit to declare a loss of non-conforming use. Bayou Fleet made lobbying efforts of its own. Bayou Fleet had private meetings with Alexander to get his support for the project; it garnered support from a United States Congressman. This is traditional political activity. The First Amendment protects "attempts to influence the passage or enforcement of laws," no matter how harmful their incidental impact may be. Noerr, 365 U.S. at 135, 81 S.Ct. at 528.

The sham exception to the Noerr-Pennington doctrine does not apply in this case. That exception applies when a defendant uses "the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon." City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991). Here, the Clulee defendants genuinely sought to achieve the governmental measures for which they lobbied. The sham exception does not apply to them because their actions were designed to achieve the outcome of the processes they used.[10] Therefore, the petitioning of

[10] Bayou Fleet alleged but did not prove that the Clulee defendants abused the legislative process by bribing Alexander. There was some testimony that council members heard rumors that Clulee had bribed Alexander, but none of the witnesses were able to recall any specific details such as from whom they had heard the rumor. Because of the unreliability and prejudicial nature of this hearsay evidence, the court denied Bayou Fleet's motion to introduce this evidence under Federal Rule of Evidence 807. The court did allow the evidence as a proffer. Even if the court were to have admitted the evidence, the court finds that it would not carry any probative value because of its vagueness and unreliability. Furthermore, to the extent that Bayou Fleet contends that a corrupt or illegal conspiracy existed, the Noerr-Pennington doctrine does not recognize a conspiracy exception. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. at 382-83, 111 S.Ct. at 1355-56.

Alexander, the Parish Council, the CZAC, and the Corps of Engineers was not a sham. See Allied Tube & Conduit Corp) v. Indian Head, Inc., 486 U.S. 492, 500 n.4, 108 S.Ct. 1931, 1937 n. 4, 100 L. Ed. 2d 497 (1988) . Accordingly, the court finds that the Clulee defendants have no liability under the antitrust laws, section 1983, or the LUTPA because they are protected by the Noerr-Pennington doctrine.

As alternative reasons for absolving the Clulee defendants of any liability in this case, the court finds that the evidence fails to establish essential elements of the section 1983 and antitrust claims.

B. Section 1983

In a section 1983 action the plaintiff must establish two essential elements: (1) that the conduct in question deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under color of state law. See 42 U.S.C. § 1983; Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

The Clulee defendants are private persons who do not occupy positions that can be considered actors "under color of state law." A private person may be considered a state actor under color of state law if the individual is engaged in a conspiracy or willfully engages in joint activity with one or more parties acting under color of state law, even if the state agent is immune to liability. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1065, 26 L.Ed. 2d 142 (1970); Cinel v. Connick, 15 F. 3d 1338, 1343 (5th

Cir. 1994), cert. denied , 513 U.S. 868, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994). In this case, the state official whose actions are implicated is Alexander. The parties stipulated that all of Alexander's actions were under color of state law.

A civil conspiracy under section 1983 is an agreement between private and public actors to violate the plaintiff's constitutional rights. Cinel, 15 F.3d at 1343. A conspiracy may be proven by circumstantial evidence, Mack v. Newton, 737 F.2d 1343 (5th Cir. 1984) ; however, the acts of the alleged conspirators must show a "unity of purpose, common design, and understanding, or meeting of the minds in an unlawful arrangement." Hale v. Townley, 19 F.3d 1068, 1075 (5th Cir. 1994)(citing American Tobacco Co. v. U.S., 328 U.S. 781, 66 S.Ct. 1125 (1946)).

"The joint action inquiry focuses on whether the state has 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity ... ' Gorenc v. Salt River Project Agric. Improvement and Power Dist. , 869 F.2d 503, 507 (9th Cir. 1989) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L. Ed. 2d 45 (1961)) . "A private party does not act under color of state law when [he] merely elicits but does not join in an exercise of official authority." Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 388 (5th Cir. 1985) , cert. denied, 486 U.S. 848, 109 S.Ct. 129, 102 L.Ed.2d 102 (1988). "It is not sufficient to allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves towards an unconstitutional action by virtue of a mutual understanding. Even were such allegations

to be made, they must further be supported by some factual allegations suggesting such a 'meeting of the minds'." See Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206 (7th Cir. 1980).

Initially, it must be noted that there is scant evidence of personal involvement on the part of Mary Clulee, Homeplace, and N/C Materials. Under section 1983 there can be no liability, much less a conspiracy between individuals that had no personal involvement in the allegedly wrongful conduct. See Murphy v. Kellar, 950 F.2d 290, 292 (5th Cir. 1992); Jacques v. Procunier, 801 F.2d 789, 793 (5th Cir. 1986). Individual liability under section 1983 must rest on facts reflecting the defendant's personal participation or involvement in the alleged wrong. The only evidence regarding Mary Clulee is two letters she wrote on behalf of Homeplace to the Corps of Engineers objecting to the permit because of proposed dredging in front of her property. Her letters show that she was not trying to prevent issuance of a permit insofar as dredging in front of Bayou Fleet's property, but only dredging that might occur in front of her property. This evidence does not come close to establishing a conspiracy or joint action between her and Alexander. The only other evidence specifically regarding Homeplace is its appearance at the CZAC meeting through an attorney to voice its objection to RAC's Corps of Engineers' permit. As for N/C Materials, the only evidence of action taken directly by it is the quote for sand it gave to RAC. This evidence is simply insufficient to establish a conspiracy between Homeplace and/or N/C Materials and Alexander. See also Scutieri v. Estate of Revitz, 683 F.Supp. 795, 800-01 (S.D. Fla. 1988) (a private corporation is not vicariously liable under § 1983 unless a policy-making individual takes action

constituting "official policy" of the corporation).

Both Alexander and Clulee specifically denied the existence of a conspiracy. Alexander indicated repeatedly at hearings and in his letters that his motives were to represent his constituents who had health and safety concerns about the sand pit operations. The evidence established that there are legitimate community concerns about sand pit operations.[11] Based on those concerns, the council members are historically opposed to sand pit operations. Clulee admitted that he was motivated by a belief that Bayou Fleet had lost its non-conforming use and by concern that there might be dredging in front of his property, both obviously matters of self-interest rather than community concerns. The fact that Alexander and Clulee wanted the same objective, that is, to prevent sand pit operations at Bayou Fleet, does not establish an agreement or joint action to put Bayou Fleet out of business by unconstitutional means.

Bayou Fleet places great emphasis on the telephone communications between Clulee and Alexander. As discussed above, private communications between a political representative and his constituent are legitimate. The First Amendment envisions interactions between political representatives and their constituents. There are no limits on how many times one can telephone a public official. Even so, in

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11 In the prior opinion rendered by this court, the court noted that there was no evidence presented at the hearing on the permanent injunction that Bayou Fleet's or any other sand pit's operations caused problems in the community. See Bayou Fleet, 1997 WL 625492 * 8. Such evidence was presented at the trial on the merits of plaintiff's claims.

the court's opinion, the evidence does not show an unusual number or length of telephone conversations, considering that Alexander and Clulee were in legitimate cooperation with each other regarding RAC's permit applications, that Clulee had information about the technical permit process that would be helpful to Alexander, and that they had other legitimate matters to discuss, such as this lawsuit.

The evidence fails to establish that the Clulee defendants had any involvement in the Parish Attorney's investigation of the status of Bayou Fleet's non-conforming use, in the letter writing campaign that Alexander undertook to various political representatives and agencies, in the sales tax audit, the Levee Law ordinance, the Special Legal Counsel resolution, the requirement of a Change of Occupancy permit, the requirement of a permit to install the guard shack, or any delays associated with those two permits.

Having found insufficient evidence of a conspiracy or joint action to equate the Clulee defendants' conduct with state action, any conduct of Alexander that violated Bayou Fleet's constitutional rights is not actionable under § 1983 as to the Clulee defendants.[12] See Scott v. Greenville County, 716 F.2d 1409, 1424 (4th Cir.1983) (recognizing that

[12] In the prior opinion rendered by this court, it was stated: "Robin Durant's uncontradicted testimony establishes that the resolution was part of a scheme to eliminate Bayou Fleet's business so that Home Place would be the only sand pit in town." See id. Neither the Clulees nor Alexander testified at that prior hearing. Furthermore, the court's conclusion herein, that there is no evidence of a conspiracy or joint action between the Clulee defendants and Alexander to put Bayou Fleet out of business by a unconstitutional means is not inconsistent with the court's prior statement.

"even overtly biased citizens who write letters, speak up at public meetings, or even express their prejudices in private meetings with public officials without formulating a joint plan of action are not 'conspiring' with those officials in a way that subjects them to § 1983 liability").

C. Sherman Act, Sections 1 and 2

Bayou Fleet's antitrust claims are based on sections 1 and 2 of the Sherman Act, 15 U.S.C.§§ 1 and 2. In order to state a claim for violation of § 1 of the Sherman Act, a plaintiff must allege (1) concerted action by two or more persons, (2) that unreasonably restrains interstate or foreign trade or commerce.

The evidence failed to show an unreasonable restraint of interstate trade. The permits RAC needed to begin its pit operations were issued without any delays beyond those normally encountered in the process. Even assuming that there were delays, there is no evidence that the delay impacted interstate trade.

A violation of section 2 of the Sherman Act is established when the plaintiff shows that the asserted violator: (1) has antitrust standing; (2) possesses or intends to possess monopoly power in the relevant market and (3) acquired or maintained that power or intends to do the same in a wilful manner. Aspen Skiing Co. v. Aspen Highlands, 472 U.S. 585, 105 S.Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985) ; United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

The evidence failed to show that Bayou Fleet suffered an antitrust injury, which is a component of antitrust standing. See Bell v. Dow Chemical Co., 847 F. 2d 1179, 1182 (5th Cir. 1988). Bayou Fleet did not prove that the conduct of the Clulee defendants had any anticompetitive effect. RAC obtained all of the permits it sought. The evidence showed that the alleged delay in the permit process was not any longer than with other applications. And, even if there had been an unreasonable delay, there is no evidence that the delay had an anticompetitive effect. Even assuming that the Clulee defendants played a wrongful role in passage of the Levee Law ordinance and the Special Legal Counsel resolution, (a fact which the evidence failed to prove), those acts were declared unconstitutional and rescinded before they took effect.

Accordingly,

IT IS ORDERED that judgment be entered in favor of defendants Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc., and N/C Materials, Inc. and against plaintiff Bayou Fleet, Inc., dismissing plaintiff's claims with prejudice, plaintiff to bear costs.

New Orleans, Louisiana this 29th day of September, 1999.

HARRY A. MENTZ, JR.
UNITED STATES DISTRICT JUDGE